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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

NORFOLK AND WESTERN RAILWAY COMPANY,
Petitioner,

v.

JAMES L. CHITTUM,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the Commonwealth of Virginia

REPLY BRIEF OF PETITIONER

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1. Contrary to its obvious intent, the opposition filed by respondent, James Chittum, concretely demonstrates why it is of such vital importance for the Court to grant review in this case and end the state court practice of applying state law to the recovery of damages under the Federal Employers' Liability Act ("FELA"). Respondent does not contest that FELA was intended to " 'create uniformity' . . . with respect to railroads' financial responsibility for injuries to their employees." *Norfolk & W. Ry.* v. *Liepelt*, 444 U.S. 490, 493 n.5 (1980) (quoting H.R. Rep. No. 1386, 60th Cong., 1st Sess. 3 (1908)). Moreover, respondent readily concedes that "the measure of damages in cases brought pursuant to [FELA] are federal in character and, therefore, are governed by federal law." Opp. 10 (citations omitted); see Pet. 7 ("the need for uniform national policy renders the calculation of damages pursuant to FELA a substantive issue of federal

law") (citation omitted). Respondent, nevertheless, concludes his opposition by taking the astonishing position that it was proper for the Supreme Court of Virginia to rely on *state* law to compute damages based on "gross earnings" rather than "net or 'take home pay.' " Opp. 26 (citing *Hoge* v. *Anderson*, 106 S.E.2d 121 (Va. 1958)); see also R. 460 (THE COURT: "The Supreme Court of Virginia has held as a matter of Virginia law that so-called take-home pay or net pay is no proper matter for consideration by the jury").

In its petition, however, petitioner demonstrated that under federal law FELA awards are to be based on " 'realistic measures' " of future income calculated from " 'after-tax income, rather than [from] . . . gross income.' " Pet. 8 (quoting *Liepelt*, 444 U.S. at 493). Respondent provides no reason—other than demonstrably inapplicable Virginia law—as to why the admitted 12.55% reduction in Chittum's net income for mandatory federal railroad retirement taxes should not be considered at all by the jury in calculating his future income stream. Instead, respondent attempts to minimize the significance of the damages miscalculation engaged in by the court below by pointing out—presumably without humorous intent—that this issue "involves only Chittum and the rest of the 213,000 employees currently engaged in the freight railroad industry." Opp. 2. Thus, by respondent's own characterization, the issue is of national importance and warrants this Court's review. See also Brief of Association of American Railroads as Amicus Curiae.

2. Petitioner has not "misinterpreted" this Court's decision in *Liepelt* as respondent asserts. Opp. 11. Respondent suggests that petitioner's alleged misinterpretation is based on the distinction between damages recoverable in a wrongful death action and in a personal injury case. Opp. 13. However, that distinction has no bearing whatsoever on the holdings in *Liepelt* (a wrongful death case) and *Jones & Laughlin Steel Corp.* v. *Pfeifer*, 462 U.S. 523

(1983) (a personal injury case) with respect to how future income streams are to be calculated. While damages in the two types of cases are "similar but not identical," this Court has recognized that the problems in determining awards for diminution of future income streams are "the same in both types of actions." *Id.* at 533 n.8. Respondent's invented distinction from *Liepelt* cannot negate the fact that the jury in this case was permitted to hear *no* record evidence of the significant and readily identifiable impact of railroad retirement taxes on Chittum's future income.[1]

Furthermore, while respondent asserts that only "income taxes" were at issue in *Liepelt*, respondent does not dispute that railroad retirement taxes are clearly federal taxes on income. Pet. 9 (citing *Hisquierdo* v. *Hisquierdo*, 439 U.S. 572, 582 (1979); 26 U.S.C. § 3201). There is no reasoned distinction between the two types of income taxes for purposes of calculating future income streams. More importantly, however, it is clear from *Liepelt* and *Pfeifer* that the applicability of this Court's decisions is not limited to whatever may be labeled "income taxes." Rather, any avoided costs should be deducted from the claimant's future income stream. *Pfeifer*, 462 U.S. at 534 ("unreimbursed costs, such as transportation to work and uniforms . . . should also be deducted in estimating the lost stream").

Respondent simply provides *no* explanation as to how such costs can be excluded consistent with his suggested limitation of deductions from gross income to "income taxes" or why Chittum is not overcompensated by recov-

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[1] On the other hand—contrary to the impression created by respondent, Opp. 15—the jury *was* presented with evidence of Chittum's likely future pay increases, R. 292A-292E, as well as his inability to increase the retirement pension annuity he would receive after his disability annuity expired, R. 399-401. Thus, the record insured that the jury's estimate of Chittum's future income stream would be significantly inflated.

ering the 12.55% of his income that he concededly never would have received had he been able to work. The petition does not ask the Court to expand *Liepelt*; it requests the Court to stop state courts from narrowing it.[2]

3. Respondent does not contest the similarities between Social Security taxes and railroad retirement taxes. See Pet. 11-12. Instead, respondent argues that the statutory schemes under which Social Security taxes have been excluded from future income stream calculations are "not really analogous in the context of this or any other FELA case involving a disabling, career-ending" injury. Opp. 21. This distinction between personal injury and wrongful death cases is irrelevant in this context as demonstrated above. Moreover, several of the cases cited by petitioner requiring the exclusion of Social Security taxes from future income streams involved disabled claimants. See *Rachal* v. *Ingram Corp.*, 795 F.2d 1210, 1218 (5th Cir. 1986) (Jones Act); *Madore* v. *Ingram Tank Ships, Inc.*, 732

[2] *CSX Transportation, Inc.* v. *Levant*, 410 S.E.2d 299 (Ga. App. 1991), *rev'd*, 417 S.E.2d 320 (Ga. 1992), quoted at length by respondent, Opp. 18, does not support respondent's argument that another state has adopted the position of the Supreme Court of Virginia. Instead, the decision demonstrates that another state court has ignored this Court's direction in yet another FELA matter. *Compare CSX*, 410 S.E.2d at 303 (refusing to admit evidence on basis that "taxes paid by plaintiff into the railroad retirement fund are to fund his future retirement and are paid directly to him upon his retirement") *with Hisquierdo*, 439 U.S. at 575 (railroad retirement benefits "are not contractual" and "Congress may alter, and even eliminate, them at any time"); *see also* Pet. 14 (discussing *Marynik* v. *Burlington N., Inc.*, 317 N.W.2d 347 (Minn. 1982)).

Oltersdorf v. *Chesapeake & Ohio R.R.*, 404 N.E.2d 320 (Ill. App. Ct.), *appeal denied*, (Ill. Sept. 29, 1980), *cert. denied*, 450 U.S. 920 (1981), on the other hand, properly reversed a trial court that refused to allow proof of the effect of railroad retirement taxes. Respondent's attempt to distinguish the case is disingenuous. The evidence on "the impact of taxation" the trial court refused to allow, *id.* at 464, clearly refers to the railroad's proffer on the effect of "Federal income taxes, state income taxes and railroad retirement taxes," *id.* at 463, on the claimant's income.

F.2d 475, 478-79 (5th Cir. 1984) (same); *Hernandez* v. *M/V Rajaan*, 841 F.2d 582, 587-88 & nn.2-3 (5th Cir.) (LHWCA), *other section of opinion corrected*, 848 F.2d 498 (5th Cir.), *cert. denied sub nom. Dianella Shipping Corp.* v. *Hernandez*, 488 U.S. 981 (1988).

The Jones Act, as demonstrated in the petition, is clearly analogous to FELA. Pet. 12. The Jones Act explicitly states that "all statutes . . . modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply." 46 U.S.C. App. § 688(a); see also *American Dredging Co.* v. *Miller*, 114 S. Ct. 981, 989-90 (1994). Perhaps this is why respondent ignores it completely. Nevertheless, on the basis of the Jones Act analogy alone, it is clear that Social Security and similar taxes should be excluded from calculations of future income streams under federal remedial schemes, such as FELA.

Respondent's tortured history of the *Culver* case, Opp. 23-24, does nothing to reduce the relevance of this issue under the LHWCA. Respondent's claim that no other court of appeals decision applies *Madore* beyond the date of *Culver* v. *Slater Boat Co.* (*"Culver II"*), 722 F.2d 114 (5th Cir. 1983), Opp. 24, is belied by *Hernandez*, 841 F.2d at 587-88 & nn.2-3, a decision cited by petitioner and expressly based on *Culver II*, which respondent wholly ignores.[3]

Without question, this case provides an effective vehicle by which the Court can ensure uniformity in the treatment of retirement taxes in measuring damages under several related federal remedial schemes that follow the FELA model. Accordingly, review by this Court of the dam-

[3] While respondent asserts that the LHWCA is not analogous to FELA, Opp. 21-22, respondent concedes the point of petitioner's argument with respect to the statute, *i.e.*, that "the treatment of reducing future economic loss to present value [in LHWCA cases] has been generally applied to FELA cases." Opp. 17 n.2 (citation omitted).

ages issue presented by petitioner, which arises in virtually every case involving federally mandated compensation under these myriad schemes, is particularly appropriate here. See *Begier* v. *IRS*, 496 U.S. 53, 57 n.2 (1990). In fact, beyond these cases ultimately resolved in various state courts, this damage calculation will affect virtually every settlement negotiation under these statutes and, if the issue of the effect of retirement taxation is left unclear, could discourage many parties from reaching settlement.

4. Finally, respondent chides petitioner for not referring the Court to the Federal Tort Claims Act, 28 U.S.C. § 2674 ("FTCA"), the one statutory scheme respondent asserts is analogous to FELA. Opp. 25. The FTCA, however, was not cited simply because it is *not* analogous. The FTCA is simply the waiver of sovereign immunity by the United States for certain existing causes of action. See, *e.g.*, *Rayonier Inc.* v. *United States*, 352 U.S. 315, 319 (1957) ("the test established by the Tort Claims Act for determining the United States' liability is whether a private person would be responsible for similar negligence under the laws of the State where the acts occurred"). It does not create a separate statutory cause of action. As a consequence, unlike FELA actions where—as respondent concedes, Opp. 10—federal law governs the issue of damages, state law controls that issue in FTCA cases. See, *e.g.*, *Molzof* v. *United States*, 502 U.S. 301, 305 (1992) ("the extent of the United States' liability under the FTCA is generally determined by reference to state law").

Respondent's reliance on the FTCA is telling. Respondent seeks to evade the application of uniform national law on the issue of damages under FELA and to overrecover for his injuries under Virginia law. This is precisely the type of variable financial responsibility and burden-shifting that FELA is supposed to curtail by establishing federal liability standards for railroads that are applicable in whichever state a claimant chooses to bring his or her action. *Liepelt*, 444 U.S. at 493 n.5 (quoting H.R. Rep.

No. 1386, 60th Cong., 1st Sess. 3 (1908)). The decision of the Virginia Supreme Court mandating the exclusion of evidence demonstrating that respondent's future income stream would have been reduced by the payment of compulsory railroad retirement taxes on income detrimentally biases the remedial effect of FELA and, by respondent's own reckoning, has the potential to affect hundreds of thousands of other claims involving FELA, as well as other analogous federal statutory schemes that respondent fails to distinguish. As a result, this case presents a significant and recurring question of federal law warranting this Court's review.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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